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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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In the Matter of

Implementation of the Non-Accounting
Safeguards of Sections 271 and 272
of the Communications Act of 1934,
as amended

CC Docket No. 96-149

PETITION FOR RECONSIDERATION/CLARIFICATION OF TIME WARNER CABLE

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Time Warner Cable, a division of Time Warner Entertainment Company, L.P. ("Time Warner"), by its attorneys and pursuant to section 405 of the Communications Act, as amended, and section 1.429 of the Commission's rules,¹ hereby submits its petition for reconsideration/clarification of certain aspects of the Commission's First Report and Order in the above-captioned proceeding.²

¹ See 47 U.S.C. § 405; 47 C.F.R. § 1.429.

² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489 (released December 24, 1996) ("Section 272 Order"). As the Order appeared in the Federal Register on January 21, 1997, at 62 Fed. Reg. 2927, this petition is timely filed in accordance with the Commission's rules. See 47 C.F.R. § 1.429(d).

I. INTRODUCTION.

In this proceeding, Time Warner has argued that BOCs have substantial incentive to evade the separate affiliate requirements on BOC provision of interLATA information services imposed by section 272 of the Telecommunications Act of 1996.³ Specifically, Time Warner believes that BOCs may seek to provide such services through an unseparated video programming affiliate. It is Time Warner's understanding that the Commission has appropriately addressed this concern in its Section 272 Order by refining its interpretation of the "incidental interLATA services" ("Incidental InterLATA Services") exempt from the section 272 separate affiliate requirement. However, Time Warner is concerned that the record on this issue may be ambiguous and therefore herein seeks clarification of the Commission's intent.

II. THE COMMISSION SHOULD CLARIFY HOW SECTION 272 APPLIES TO BOC PROVISION OF VIDEO SERVICES.

Section 272 of the 1996 Act requires, inter alia, that BOCs offering interLATA information services do so only through one or more affiliates that are separated from any operating company of the BOC subject to the requirements of section 251 of the 1996 Act.⁴ The application of section 272 to interLATA information services is qualified only to exclude electronic publishing and alarm monitoring from regulation under section 272.⁵ The plain language of this provision requires that all other BOC interLATA

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

⁴ See 47 U.S.C. §§ 272(a)(1), 272(a)(2)(c) and § 272(b).

⁵ See 47 U.S.C. § 272(a)(2)(c).

information services be provided only subject to the requirements of section 272.

However, for interLATA telecommunications services, section 272(a)(2)(B)(i) exempts "incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g)"⁶ from the requirements of section 272. Section 271(g)(1)(A) includes "audio programming, video programming, or other programming services" in the definition of Incidental InterLATA Services.⁷ While this provision would seem contrary to the section 272(a)(2)(C) language applying section 272 to BOC interLATA information services,⁸ section 271(h) qualifies the treatment of BOC audio, video and other programming services as Incidental InterLATA Services. Specifically, section 271(h) states that the provisions of section 271(g) are "to be narrowly construed" and limits the application of section 271(g)(1)(A) (inter alia) to "those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public."⁹

Thus, the statutory language can be read to distinguish between the telecommunications service transmission underlying a video programming service and the video programming service

⁶ 47 U.S.C. §§ 272(a)(2)(B)(i).

⁷ See 47 U.S.C. § 271(g)(1)(A).

⁸ Section 272 does not apply to electronic publishing and alarm monitoring services. See 47 U.S.C. § 272(a)(2)(C).

⁹ 47 U.S.C. § 271(h).

itself. The transmission component is exempt from section 272 as an Incidental InterLATA Service, while the video programming service is not.

In the Section 272 Order, the Commission essentially adopted the foregoing analysis, stating that:

[a]lthough the incidental interLATA services set forth in sections 271(g)(1)(A), (B), and (C) include audio, video and other programming services that do not appear to be solely telecommunications services, section 271(h) specifies that these incidental interLATA services "are limited to those interLATA transmissions incidental to the provision by a [BOC] or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public." We therefore conclude that, pursuant to section 272(a)(2)(B)(i), BOCs are not required to provide the interLATA telecommunications transmission incidental to provision of the programming services listed in sections 271(g)(1)(A), (B), and (C) through a section 272 separate affiliate.¹⁰

In other words, only the interLATA telecommunications service transmission underlying a BOC's video programming service is to be treated as an Incidental InterLATA Service for the purpose of section 272(a)(2)(B)(i), and not the video programming service itself. The Commission's analysis logically implies, but does not state, that the video programming service itself is to be treated just as any other non-electronic publishing information service under section 272(a)(2)(C), fully subject to the separate affiliate requirements of section 272. In light of this ambiguity, Time Warner requests that the Commission clarify that

¹⁰ Section 272 Order at ¶ 94 (citations omitted).

BOC provision of video programming services which fall within the interLATA information services covered by section 272(a)(2)(c) are subject to the section 272 separate affiliate requirement.

As the Commission acknowledges, its interpretation of section 272(a)(2)(B)(i) and section 271(g) and (h) is inconsistent with the interpretation of the section 272 (a)(2)(B)(i) exemption announced in its decision implementing regulations governing the creation and operation of open video systems ("OVS") by LECs.¹¹ In the OVS Order, the Commission found that "[s]ection 272 exempts 'incidental interLATA services' from the separate affiliate requirement, and includes certain video programming services within the definition of 'incidental interLATA services' described in Section 271(g),"¹² and declined to impose a separate affiliate requirement on BOC provision of OVS pursuant to section 272.¹³ The Commission has abandoned that interpretation of the Incidental InterLATA Services exemption in this proceeding.¹⁴ However, the Commission states that the interpretation of the exemption for Incidental InterLATA Services announced in the Section 272 Order is consistent with its

¹¹ Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Second Report and Order, (released June 3, 1996) ("OVS Order").

¹² Id. at ¶ 249.

¹³ Id.

¹⁴ See Section 272 Order at ¶ 94, n.210 ("[t]o the extent we interpreted the section 272(a)(2)(B)(i) exemption more broadly in [the OVS] proceeding than we do in [the section 272] proceeding, we determine that our current interpretation is correct.") Id.

"determination. . . that BOCs are not required to provide open video services through a section 272 affiliate."¹⁵

Time Warner believes that this statement essentially recognizes that BOC provision of OVS platform services and transmission are the type of telecommunications service transmissions that Congress intended to exempt from section 272 as Incidental InterLATA Services. Time Warner understands this language to require that BOCs provide video programming services to end users only through a section 272 separate affiliate, and that the underlying transmission service, or OVS platform, is not subject to the strictures of section 272 and may, therefore, be provided by a BOC's local telephone operating company. This is the only interpretation of the application of section 272 to BOC video programming services which is consistent with the Commission's finding that only telecommunications service transmissions underlying video services are exempt from section 272. Time Warner requests that the Commission confirm this interpretation to allow BOCs to come into full compliance with section 272 in a timely fashion.

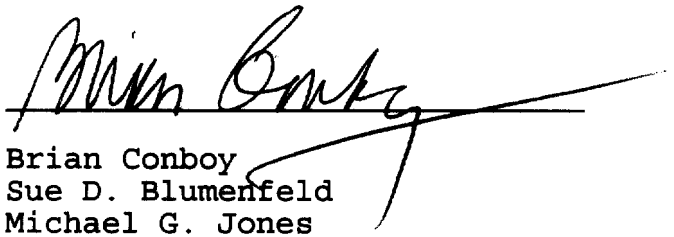
¹⁵ Id.

III. CONCLUSION

For the reasons set forth above, Time Warner requests that the Commission clarify (1) that only interLATA telecommunications service transmissions underlying BOC video programming services are exempt from the section 272 separate affiliate requirement, and (2) that BOC video programming services remain subject to the section 272 separate affiliate requirement.

Respectfully submitted,

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